

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERESA SAMSEL

Claimant

VS.

CAPITOL PLAZA HOTEL

Respondent

AND

UNITED STATES FIRE INS. CO.

Insurance Carrier

Docket No. 1,000,151

ORDER

Respondent requests review of a preliminary Order entered by Administrative Law Judge Brad E. Avery on February 26, 2002.

ISSUES

The Administrative Law Judge determined claimant suffered an accidental injury arising out of and in the course of employment on October 29, 2000.

The sole issue raised on review by the respondent is whether the Administrative Law Judge erred in finding the claimant's accidental injury arose out of and in the course of her employment.

The claimant argues the Administrative Law Judge's Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record compiled to date, the Board makes the following findings of fact and conclusions of law:

Claimant began her employment with respondent on June 13, 2000, and her job duties at the restaurant have included work as a hostess, bartender, banquet bartender

and room service delivery. Claimant alleged she sustained injury while performing room service deliveries on October 29, 2001.

Claimant also alleged an injury on October 21, 2001, when she picked up a tray loaded with dishes and experienced a pop in her shoulder with pain down her arm and wrist numbness. Although claimant mentioned the incident to a co-worker, she did not report the incident to her supervisor. Claimant did not seek treatment that night.

The next day claimant was moving out of her apartment and reached to remove a box from a closet shelf and her shoulder again popped with an immediate onset of pain and numbness. Claimant immediately sought treatment with Jennifer L. Clair, M.D. and was taken off work and provided restrictions against lifting more than 5 pounds with the left arm.

Claimant returned to work a few days later but was still having problems with her shoulder. Ben Hardin, the human resource manager for respondent, was aware claimant had hurt her shoulder. Because of Dr. Clair's note, Mr. Hardin attributed her shoulder injury to the incident that occurred while she was moving from her apartment on October 22, 2001. Nonetheless, Mr. Hardin instructed claimant's supervisors to follow the restrictions and not have claimant lift over 5 pounds.

On October 29, 2001, claimant was assigned hostess duties at the restaurant, which would accommodate her lifting restriction. However, the restaurant supervisor, Carla Drum, instructed claimant to perform some room service deliveries. Claimant advised the supervisor she couldn't make the deliveries because the trays exceeded the 5 pound restriction. Nonetheless, the supervisor advised claimant to just do the job.

Claimant delivered the first order and when she picked up the food tray she had pain in her shoulder. Claimant advised her supervisor who just ignored the claimant. Claimant made at least two additional room service deliveries that shift. Claimant testified that after performing the room service deliveries on October 29, 2001, her shoulder, arm and wrist pain increased.

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.¹ "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."²

¹K.S.A. 44-501(a); see also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

²K.S.A. 44-508(g). See also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁴

Respondent argues claimant did not suffer a work-related injury on October 21, 2001, and only alleged that injury after the human resources manager advised her that there was no requirement to accommodate the physician's restrictions unless the injury was work-related. Accordingly, respondent further argues claimant's credibility is lacking and her testimony should be disregarded.

Regardless of whether claimant suffered the work-related injury on October 21, 2001, she further alleged an injury on October 29, 2001, while making room service deliveries. Claimant's uncontradicted testimony establishes that her shoulder, arm and wrist condition worsened while making those deliveries. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁵

When an Administrative Law Judge renders a decision regarding the credibility of witnesses who testify in person before him, as in this case, the Board gives some deference to that opinion. Herein, the Administrative Law Judge's finding indicates he found the claimant a credible witness. The Board agrees and finds the claimant aggravated her shoulder, arm and wrist condition while performing the room service duties on October 29, 2001. Accordingly, the Administrative Law Judge's Order for Compensation, dated January 10, 2002, is affirmed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁶

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated January 10, 2002, is affirmed.

³*Brobst v. Brighton Place North*, 24 Kan. App.2d 766,771, 955 P.2d 1315 (1997).

⁴*Springston v. IML Freight, Inc.*, 10 Kan. App.2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

⁵*Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App.2d 334, 678 P.2d 178 (1984).

⁶K.S.A. 44-534a(a)(2).

IT IS SO ORDERED.

Dated this _____ day of March 2002.

BOARD MEMBER

c: Beth Regier Foerster, Attorney for Claimant
Donald J. Fritschie, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director